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IN THE

Supreme Court of the United States

_____ TERM, 1967

No. 734

EDWARD L. GLADNEY,

Petitioner,

versus

REVIEW COMMITTEE, COMPOSED OF HARVEY H. HOWINGTON, JR., HARRY E. MOCK and WILLIAM YERGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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No.

EDWARD L. GLADNEY,

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REVIEW COMMITTEE, COMPOSED OF HARVEY H. HOWINGTON, JR., HARRY E. MOCK and WILLIAM YERGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered in this action on August 21, 1967.

CITATIONS TO OPINIONS BELOW

The unreported opinion and judgment of the United States Court of Appeals, dated August 21, 1967, is printed in Appendix A, pp. 15-16.

The opinion and judgment of the United States District Court for the Western District of Louisiana dated August 16, 1966, reported at 257 F. Supp. 57 is printed in the record reviewed by the Court of Appeals below which has been filed with this application.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Articles I, II and III of the United States Constitution, and the doctrine of separation of powers required thereby. The statutes involved are 7 U.S.C. 1344 (f) (8); 7 U.S.C. 1361-68.

STATEMENT OF THE CASE

This case arises from the judicial review of an administrative cotton allotment determination in accordance with the Agricultural Adjustment Act of 1938, 7 U.S.C. 1361-68.

In 1964 the petitioner, a cotton farmer, appealed to the district court from the administrative agency's determination of his cotton allotment. The district court found the determination to have been based upon an error of law and remanded the case to the agency. The agency made a new determination whereby the petitioner's allotment was increased by some 100 acres. Shortly thereafter, the agency appealed from the district court's decision.

On appeal, the Court of Appeals affirmed the district court's decision. It agreed that the original administrative determination of petitioner's allotment had been based upon an error of law. The appellate court also stated that it found no reversible error in the district court's decision.

But to its opinion the Court of Appeals attached a caveat: "that the increased allotment resulting from and required by [the district court's] judgment is not binding as a basis for future allotments."

Prior to the Court of Appeals' decision which was rendered on January 12, 1966 the administrative agency had made determinations of petitioner's allotments for 1965 and 1966 based upon his increased 1964 allotment determination. Shortly after the Court of Appeals' decision was rendered, the agency retroactively re-determined the petitioner's allotments for 1964-66 and reduced each of them by approximately 100 acres.

The petitioner immediately appealed to the district court from this latest administrative action. The district court held that the 1964-66 allotment determinations were final administrative determinations which could not be altered since Congress had not expressly granted authority for such alterations. This much of the district court's decision was correct. But the district court went on to decide that the caveat in the Court of Appeals' decision had: (1) rendered inoperative as to petitioner the statute (7 U.S.C. 1344 (f) (8)) which makes the preceding year's allotment the basis for the following year's allotment, and (2) therefore, petitioner's 1966 allotment would have no effect upon and would not form the basis of his 1967 allotment. In effect, the district court's decision set the administrative agency free to make any 1967 allotment determination that it might desire without the necessity of using any rational basis for its determination.

Petitioner appealed from this part of the district court's decision which stripped his 1966 allotment of its ordinary future effect. The agency appealed from the part

of the judgment which reversed its alteration of its final 1964-66 allotment determination but later dismissed its appeal. The Court of Appeals affirmed the district court's decision suspending the statute (7 U.S.C. 1344 (f) (8)) as to petitioner and striking from his 1966 allotment its normal future effect. The Court of Appeals denied these actions in its opinion but regardless of its denials the effects of its decision are clear: Petitioner's 1966 allotment has been shorn of its future effect. Consequently, petitioner is the only American cotton farmer who will not have his 1967 allotment determined as Congress provided in 7 U.S.C. 1344 (f) (8).

QUESTIONS PRESENTED

1. Whether the administrative agency's determinations of petitioner's 1965 and 1966 allotments, which had become final, could be modified by the Court of Appeals in the absence of express statutory authority allowing for the alteration of final allotment determinations?

2. Whether the Court of Appeals could modify the administrative agency's determination of petitioner's 1965 and 1966 allotments and substitute the modified determination for the agency's original determination?

3. Whether the Court of Appeals could render inoperative 7 U.S.C. 1344 (f) (8) insofar as it applies to petitioner's cotton farm?

REASONS FOR GRANTING THE WRIT

1.

Since final administrative agency determinations cannot be altered without congressional authority, the petitioner's 1965 and 1966 allotment determinations could not be altered so as to strip them of their normal future effect.

This court has firmly established the principle that once a determination by an administrative agency becomes final it "is not subject to revocation in whole or in part except as specifically authorized by Congress." *United States v. Seatrain Lines*, 329 U.S. 424, 432, 91 L. Ed. 396, 401 (1946). In reaffirming this principle the Supreme Court has explained that "the [administrative agency] is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do," *C. A. B. v. Delta Air Lines*, 367 U.S. 316, 321, 6 L. 2d 869, 874 (1961), and that "supervising agencies desiring to change existing [determinations] must follow the procedures specifically authorized by Congress and cannot rely on their own notions of implied powers in the enabling act." Id. 367 U.S. at 334, 6 L. Ed 2d at 881. Because an agency's powers are limited to those granted by Congress, an agency cannot prevent its determination from becoming final by adding a proviso to that determination to the effect that it is "subject to later amendment," Id. 367 U.S. 316, 325, or that it is subject to future "terms, conditions and limitations," *United States v. Seatrain Lines*, 329 U.S. 424, 427. An agency's determination will become final on the date upon which the regulated person "commenced operations [pursuant to the agency's determination], with the concomitant investment in facilities and personnel, not the date that abstract legal

analysis might indicate as the final date." *C. A. B. v. Delta Air Lines*, 367 U.S. 316, 325.

In its opinion below the district court recognized the principle that final administrative determinations may not be modified without specific Congressional authorization. The district court necessarily concluded that the Agricultural Adjustment Act does not contain any such specific congressional authorization for the changing of final allotments. The district court expressly concluded as a matter of law that the petitioner's 1965 and 1966 allotments were "final as to both the administrative agency and the farmer" under the holdings in the *Seatrain Lines* and *Delta Air Lines* cases. The administrative agency appealed from this holding but dismissed its appeal before the case was heard by the Court of Appeals.

In the second part of its opinion below, the district court ignored what it had said in the first part. It decreed that the 1966 administrative determination, which it had earlier recognized as a final determination and therefore irrevocable, had been partially revoked insofar as it would have had a prospective effect upon the petitioner's 1967 allotment. Petitioner appealed from this portion of the district court decision.

The Court of Appeals affirmed, stating that, by an earlier decision, it had stripped petitioner's 1966 allotment of "all prospective significance." The Court of Appeals completely ignored its lack of authority to modify administrative agency determinations. (Discussed below). But it did seek to excuse its alteration of a final administrative determination by stating that this particular determination "was not the result of a factual or policy determination" by the agency. In effect, the Court of Appeals stated

that the 1966 administrative determination was merely a conditional one issued by the agency pending the litigation concerning petitioner's 1964 allotment. Thus, refined to its essence, the Court of Appeals' position is that it could modify the agency's 1966 determination because the agency did not intend it to be a final and independent determination.

There is no evidence to support the Court of Appeals' conclusion. Furthermore, under the Supreme Court's decisions in *C. A. B. v. Delta Air Lines, supra* and *United States v. Seatrain Lines, supra,* the agency's intention in making a determination is not pertinent to the question of its finality or binding future effect. Once the determination has been made and the regulated person begins operations thereunder, the determination becomes final and binding upon the administrative agency. The agency may not forestall finality of a determination even by adding an express proviso intending to delay finality, *C. A. B. v. Delta Air Lines, supra; United States v. Seatrain Lines, supra,* much less by an unexpressed, subjective intention as the Court of Appeals seems to rely upon in its opinion.

The Court of Appeals was clearly wrong in holding that the 1966 administrative determination could be modified so as to have no future effect. The law is very clear that a final administrative agency determination cannot be changed without a specific congressional authorization. There is no such authorization for changing final allotment determinations under the Agricultural Adjustment Act. Therefore, it was clearly reversible error for the Court of Appeals to hold that the 1966 allotment had been changed in the face of well settled principles of law under which both the 1965 and 1966 allotments were final and irrevocable.

2.

Since federal courts lack the power to modify administrative agency determinations, the court of appeals could not nullify the future effect of appellant's 1966 allotment.

The Court of Appeals held that, in the first Gladney case, it had modified petitioner's 1965 and 1966 allotments so that they "* * * lost all prospective significance." In doing so the Court of Appeals violated the firmly established principle that courts will not alter or re-determine a matter the determination of which Congress has entrusted to an administrative agency.

It would be difficult to determine the origin of this principle since it has been a cardinal rule of judicial review for many decades, e.g., *Tex. & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907). However, one of the more recent and perhaps most cogent expressions of the principle was made in *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85 (1952), in which the Supreme Court reversed a Court of Appeals judgment which had usurped an administrative function. The Federal Power Commisison had granted a power company a license to construct a hydroelectric project, conditioned upon the company's allowing the government to use the project's power lines. The Court of Appeals found that the commission had no authority to attach the condition, modified the commission's order by striking the condition, and affirmed the order as thus modified. In reversing, the Supreme Court stated:

> "* * * When the court decided that the license should issue without conditions, it usurped an administrative function * * * [T]he guiding principle, violated

> here, is that *the function of the reviewing court ends when an error of law is laid bare.* At that point the matter once more goes to the commission for reconsideration. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 1 ALR 2d 260." (Emphasis added).

The Supreme Court explained that it is the commission's judgment upon which Congress has placed its reliance for the control of licenses. Whether the Congressional objective would be achieved by simply striking the invalid condition from the order was an administrative, not a judicial decision. The Court of Appeals, after pointing out the error of law, should have remanded to the Commission, which might have reissued the order without the contested condition or might have withheld its consent to any license. *Federal Power Commission v. Idaho Power Company, supra.*

Numerous later decisions have reaffirmed the principle that "the function of the reviewing court ends when an error of law is laid bare."

In *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 2 L. Ed. 2d 370, 78 S. Ct. 377 (1958), the agency had issued a cease and desist order, effective immediately. The Court of Appeals affirmed but provided that the order should take effect "at such future time as the * * * Court of Appeals * * * may direct * * *." The Supreme Court vacated the Court of Appeals' judgment holding that the lower appellate court had exceeded its authority in modifying the "ancillary features of a valid commission order." Id.

In *Public Utilities District No. 1 v. F. P. C.*, 242 F. 2d 672 (9th Cir. 1957), *Texas American Asphalt Co. v. Walker*, 177 F. Supp. 315 (S. D. Tex. 1959), and *Salzburg v. United States*, 176 F. Supp. 867 (S.D. N.Y. 1959) the reviewing courts correctly applied the principle described in *F. P. C. v. Idaho Power Co., supra*, by laying bare the administrative error and remanding without attempting to modify the agency's determination.

The Supreme Court, in apparently its most recent encounter with the principle, reaffirmed it in *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co.*, 379 U.S. 642, 13 L. Ed. 2d 550, 85 S. Ct. 610 (1965). The district court, finding an error of law in the determination of an Interstate Commerce Commission's order, had enjoined enforcement of the order. But the Supreme Court vacated the injunction, holding that the district court should have merely pointed out the error of law and remanded to the commission. In remanding, the Supreme Court again cited *F. P. C. v. Idaho Power Co., supra.*

There can be little doubt that the striking away from an allotment all of its normal future consequences would amount to a substantial modification or abridgement of the allotment. Compared to the judicial modifications disapproved by the Supreme Court in *F. P. C. v. Idaho Power, Moog Industries v. F. T. C.* and *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co.*, the modification of appellant's allotment created by the Court of Appeals' decision herein is an extremely drastic intrusion upon the administrative domain. In *Idaho Power Co.* the reviewing court affirmed the agency's grant of a license but erroneously struck out a condition attached to the license. In *Moog Industries* the reviewing court affirmed the cease and desist order but erroneously postponed indefinitely its future effect. In this

case, the Court of Appeals has permanently modified the allotment by abrogating its future effect. Whereas in *Moog* and *Idaho* the reviewing court was rebuked for modifying a mere ancillary feature of the agency's determination, the Court of Appeals in this case has destroyed the entire administrative determination, as far as its future effect is concerned.

The Court of Appeals, under the clear holdings in *F. P. C. v. Idaho Power Co., supra, Moog Industries v. F. T. C., supra,* and *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co., supra,* was powerless to modify appellant's allotment by striking out its future effect, and for this reason its judgment should be reversed.

3.

Since federal courts lack the power to perform legislative functions, the Court of Appeals could not have rendered 7 U.S.C. 1344(f)(8) inoperative.

The district court's conclusion that the Court of Appeals' caveat had "rendered inoperative 7 U.S.C. 1344 (f) (8)" is in clear contravention of the doctrine of separation of powers. The Court of Appeals' decision, which tacitly affirmed this conclusion, is equally erroneous. It is trite but correct that the first three articles of the Constitution divide the legislative, executive and judicial powers of the United States into three separate branches. It is also well known that the courts have recognized and preserved this separation. In *Hampton Jr. & Co. v. United States,* 276 U.S. 394 (1928) Chief Justice Taft stated that "* * * it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch * * *."

The repeal or suspension of an Act of Congress is clear-

ly an act requiring the exercise of legislative power. It has long been well settled that federal courts cannot perform legislative functions. *Mississippi v. Johnson*, 4 Wall. 475 (1867). Furthermore, a suspension or repeal of the statute would leave the administrative agency with the power to establish petitioner's allotment in future years, but without any guidelines for the agency to follow in exercising this power. Such a result would be unconstitutional, since it is well settled that legislative functions cannot be delegated to an administrative agency unless the agency is first provided with an intelligible principle delimiting the agency's power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381; *United States v. Rock Royal Co-operative*, 307 U.S. 533; *Schechter v. United States*, 295 U.S. 495; *Panama Ref. Co. v. Ryan*, 293 U.S. 388; *Yick Wo v. Hopkins*, 118 U.S. 356; *Cf. Orleans Parish School Board v. Bush*, 242 F. 2d 156 (5th Cir. 1957).

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment below reversed, with directions to remand to the administrative agency for further proceedings in accordance with the court's decision.

Respectfully submitted,

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Edward L. Gladney.

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of October, 1967, two copies of the foregoing petition for a writ of certiorari were served by mail, postage prepaid, upon counsel for appellee:

Mr. Alan S. Rosenthal and
Miss Nancy A. Wynstra,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

JAMES L. DENNIS

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1967

No. _____

EDWARD L. GLADNEY,
Petitioner,

—against—

REVIEW COMMITTEE, COMPOSED OF
HARVEY H. HOWINGTON, JR.,
HARRY E. MOCK and
WILLIAM YERGER,
Respondent.

APPENDICES

Appendix A—Constitutional Provisions and Statutes Involved

The Constitution of the United States of America provides, in pertinent part:

ARTICLE I

"Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. * * *"

ARTICLE II

"Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years,

and, together with the Vice President, chosen for the same Term, be elected, as follows * * *"

ARTICLE III

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. * * *"

7 U.S.C. 1344 (f) (8) provides, in pertinent part:

"* * * the Secretary shall, if allotments were in effect the preceding year, provide for the county acreage allotment for the 1959 and succeeding crops of cotton, less the acreage reserved under paragraph (3) of this subsection, to be apportioned to farms on which cotton has been planted in any one of the three years immediately preceding the year for which such allotment is determined, on the basis of the farm acreage allotment for the year immediately preceding the year for which such apportionment is made * * *."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24323

EDWARD L. GLADNEY,

Appellant,

versus

REVIEW COMMITTEE, COMPOSED OF HARVEY H. HOWINGTON, JR., HARRY E. MOCK, and WILLIAM YERGER,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(July 21, 1967.)

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

Appendix B—Opinions, Judgments and Decree Below

DYER, Circuit Judge: By this appeal Gladney challenges the judgment of the District Court upholding the Review Committee's administrative determination that

* Of the Tenth Circuit, sitting by designation.

Gladney's cotton allotment base should be reduced from 141 acres to 39.6 acres in accordance with the Agricultural Adjustment Act of 1938, as amended.[1] We affirm.

In the 1964 cotton allotment year, farm allotments for Gladney's parish were established on the basis of the preceding year's allotments.[2] The Committee discovered, however, that the parish allotment, not considering the parish reserve for adjustments and its portion of the state reserve for inequities and hardship cases, was not sufficient to make the 1964 allotments equal to the 1963 allotments. The Committee, therefore, determined to distribute the reserve acreage so that each farm in the parish received an increase in its 1964 allotment sufficient to bring this allotment up to the total of the 1963 allotment. The County Committee thereupon decided that every farm in the parish was an inequity or hardship case and allotted additional acreage to all farms from the parish's reserve acreage. The Committee, in making its reserve acreage allotment, did not consider the various factors as required by the statute,[3] but simply distributed it on the basis of a *pro rata* share of the 1963 allotments.

Gladney is the owner of a 1,000 acre farm with 520.7

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[1] 7 U.S.C.A. § 1281 et seq. The Act provides a statutory scheme for the limiting of cotton production by establishing acreage allotments on the national, state and county levels. The county acreage allotments are distributed to the local farmers by a county committee. 7 U.S.C.A. 1344(f). These allotments may be adjusted (from a reserve acreage in the county) to prevent hardship and inequity after considering a combination of factors including land, labor, equipment available for cotton production, crop rotation practices and physical facilities affecting production. 7 U.S.C.A. 1344 (f) (3) and (6).

[2] 7 U.S.C.A. 1344 (f) (8) provides in pertinent part:

> "* * * the Secretary shall, if allotments were in effect the preceding year, provide for the county acreage allotment for the 1959 and succeeding crops of cotton * * * to be apportioned to farms on which cotton has been planted in any one of the three years immediately preceding the year for which such allotment is determined, on the basis of the farm acreage allotment for the year immediately preceding the year for which such apportionment is made * * *."

[3] See note 1, *supra*.

acres of cropland. His cotton allotments from 1954 to 1963 ranged from 29 to 43 acres. He planted 100 per cent of his allotment each year. In 1963 Gladney's allotment was 39.6 acres and in 1964 the County Committee set it at the same acreage. The Review Committee upheld the 1964 allotment over Gladney's protests that the County Committee had not considered the inequities of his allotment prior to the 1964 *pro rata* distribution, based on the additional cropland he had cleared and the larger allotments of nearby farms of comparable size. Gladney sought review of this determination in the District Court.

The District Court held that both the County and the Review Committee had abused their discretion by determining that all farms in the parish were hardship cases and allotting the reserve acreage on a *pro rata* basis rather than by a consideration of the statutory factors. The Court further held that Gladney was a hardship case, noting that other farms in the area had an acreage allotment of 27 percent of their cropland, whereas Gladney had only an 8 percent allotment. The Court concluded that a 141 acre allotment to Gladney would rectify the inequity.[4] The case was remanded and the Review Committee, in compliance with the District Court's order, issued a revised allotment determination increasing Gladney's 1964 allotment to 141 acres. The Review Committee appealed the District Court's decision. While the appeal was pending it became necessary to issue the 1965 and 1966 allotments, and, in accordance with the statutory mandate,[5] Gladney was allotted 141 acres for 1965 based upon his allotment for 1964, and the same acreage for 1966 on the basis of his 1965 allocation.

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[4] *Gladney v. Review Committee*, D.C. W.D. La. 1964, 230 F. Supp. 35.

[5] See note 2, *supra*.

In 1966 this Court affirmed the District Court's decision that *pro rata* distribution to solve hardship and inequities was an incorrect method, but disagreed with the lower court's holding that Gladney was entitled to a hardship and inequity allotment because of the availability of additional land for planting, since this is one, but not necessarily the controlling factor.[6] Notwithstanding this disagreement this Court affirmed the District Court because of "* * * the peculiar situation here shown, which is one not likely to recur, * * *." The Court added, however, that it was affirming "with the caveat that the increased allotment resulting from and required by its judgment is not binding as a basis for future allotments."[7]

The County Committee thereupon retroactively reduced Gladney's allotments for 1964, 1965 and 1966 to 39.6 acres. The Review Committee upheld the reduction as a base for future allotments to Gladney, but ruled that retroactive imposition of the reduced allotments would cause a hardship to Gladney and that the reduced base should not be employed until the 1967 allotment was issued.

Gladney again appealed to the District Court, claiming that his 1964, 1965 and 1966 allotments were final and must stand and that they must serve as the basis for his 1967 allotment. The District Court held that the 1964-1966 allotments of 141 acres were final as to all parties and that the Committee should not have retroactively reduced them, but that this Court's opinion did not bind the Committee in fixing Gladney's 1967 allotment.

Gladney urges that the caveat in our prior opinion[8] does not apply to his future allotments but was intended

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[6] *Review Committee v. Gladney*, 5 Cir. 1966, 354 F.2d 990.
[7] *Review Committee v. Gladney*, 354 F.2d at 991.
[8] See note 7, *supra*.

merely as a warning of the peculiar factual circumstances underlying the decision for, if it were construed to mean that the Committee can disregard Gladney's 141 acre allotment in determining his 1967 allotment, this Court would be rendering inoperative 7 U.S.C.A. § 1344(b)(8) which requires that a farmer's allotment be based upon his allotment for the preceding year. By so doing, Gladney argues, this Court would be performing a legislative function in violation of the doctrine of Separation of Powers.

Refined to its essence, Gladney's position is that the effect of the Review Committee's compliance with the District Court's order pending this Court's decision on appeal was to fix 141 acres as the base for *all* future allotments. We hold this to be clearly untenable.

This Court, having held in 1966 that Gladney was not entitled to have his 1964 allotment increased to 141 acres out of the hardship and inequity reserve, could have reversed the District Court's judgment. This was not done because the 1964 planting and harvesting season had become history, but this did not affect our conclusion that the 141 acre figure should not be regarded as the base for future allotments. We took pains to point out that because of the peculiar situation we were affirming the District Court's judgment, but that the increased allotment resulting from and required by the judgment was not binding as a basis for future allotments.

The initial order of the District Court directing a 141 acre allotment for 1964 had to be assumed by the Committee to be valid until this Court had passed upon it; but when this Court decided that the District Court should not have ordered an increase in the 1964 allotment, the 1965 and 1966 allotments (based upon the 1964 court ordered allotment) likewise lost all prospective significance.

Gladney's allotment of 141 acres was not the result of a factual or policy determination by the Committee. It was the result of the District Court's initial decision that Gladney's allotment should be increased because he had cleared additional land on his farm. The Committee carried out this mandate, pending this Court's decision on appeal. Thus, this Court did not modify an independent administrative decision regarding the allotments. It simply limited the effect of the District Court's decision on the 1964 allotment which, *pendente lite*, the Committee felt obligated to follow for 1965 and 1966.

Because the appellate process is time consuming Gladney has received a windfall for three years by enjoying the benefits of an allotment ultimately found to be erroneous. The District Court was correct in finding that Gladney may not continue to capitalize on the initial error and that it should be left to the Committee to decide whether, applying the appropriate criteria, Gladney's farm is to be considered a hardship or inequity case and, if so, how much of the reserve acreage should be allotted to him to rectify the inequity.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 24323

D. C. Docket No. CA 11945

EDWARD L. GLADNEY,

Appellant,

versus

REVIEW COMMITTEE, COMPOSED OF
HARVEY H. HOWINGTON, JR.,
HARRY E. MOCK, and
WILLIAM YERGER,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed.

July 21, 1967

Issued as Mandate: Aug 14 1967

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* Of the Tenth Circuit, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 734

EDWARD L. GLADNEY, PETITIONER

v.

REVIEW COMMITTEE, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This dispute [1] involves the program under the Agricultural Adjustment Act of 1938, 7 U.S.C. 1281, *et seq.*, for the control of cotton production by means of acreage allotments.[2] Petitioner is the owner of a

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[1] The decision of the court below is reported at 380 F. 2d 929.

[2] The Agricultural Adjustment Act of 1938 provides a statutory scheme to limit national and individual farm production and marketing of cotton in order to provide a balanced flow

1,000-acre farm located in Morehouse Parish, Louisiana, 520.7 acres of which are cropland.[3] For the 1964 allotment year, petitioner's local County Committee discovered that the parish's total allotment for that year was less than for the preceding year, and it determined to make a *pro rata* distribution of the "hardship reserve" acreage to the farms in the parish so that all farmers in the area would have the same allotment for both 1963 and 1964. Petitioner had been allotted 39.6 acres in 1963, so the county committee set it at the same acreage for 1964.

Petitioner appealed to the Review Committee, claiming that he was suffering an additional hardship and inequity which the Committee should have considered and corrected before making the *pro rata* dis-

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of the commodity for interstate and foreign commerce. 7 U.S.C. 1341. In brief, this is accomplished by the establishment of national, state and county acreage allotments plus acreage reserves on all three levels. The acreage available to a county is distributed to farmers within the county (or parish as here) by a county committee, which may reserve a percentage of the county allotment to correct inequities and prevent hardship to individual farmers by making adjustments to individual allotments after considering such factors as land, labor, equipment available for cotton production, crop-rotation practices, and physical facilities affecting production. 7 U.S.C. 1344(f) (3) and (6). Determinations of the county committee are subject to review by a review committee composed of three farmers from the area, appointed by the Secretary of Agriculture. 7 U.S.C. 1363. Under 7 U.S.C. 1344(f) (8), each individual farmer's allotment is based upon "the farm acreage allotment for the year immediately preceding the year for which such apportionment is made * * *," but is subject to certain adjustments.

[3] The facts in this litigation are undisputed.

tribution. The basis of his claim was that his 1964 allotment of 39.6 acres represented about 8% of his cropland, while comparable farms in the parish were receiving allotments of about 27%. Prior to 1959, his allotments had averaged 24% of his cropland, but in that year he had begun clearing additional cropland, thus decreasing the percentage of his cropland represented by his allotment.

The Review Committee upheld the allotment of 39.6 acres, and petitioner sought review of this determination in the district court.[4] That court, in April 1964, 230 F. Supp. 35, held that both the County Commitee and the Review Committee had abused their discretion by determining that all farms in the parish were entitled to a *pro rata* distribution of the reserve acreage. The court further held that petitioner was a hardship case and that he was entitled to an allotment of 141 acres, in order to bring his acreage allotment up to 27% of his cropland. The case was remanded to the Review Committee for a new determination of petitioner's allotment not inconsistent with the district court's opinion.

The Review Committee, in compliance with the district court order, issued a revised allotment determination increasing petitioner's 1964 allotment to 141 acres. The Review Committee also filed a timely appeal to the Court of Appeals for the Fifth Circuit from the district court's decision. Before the Fifth Circuit decided the appeal, it became necessary to is-

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[4] Judicial review of decisions of a Review Committee is provided for by 7 U.S.C. 1365.

sue the 1965 and 1966 allotments. In accordance with the statutory requirement of 7 U.S.C. 1344(f)(8) that allotments be based on the allotment for the preceding year, petitioner was allotted 141 acres for 1965, based on the 141-acre 1964 allotment, and 141 acres for 1966, based on the 1965 allotment.

On January 12, 1966, the Fifth Circuit rendered its decision, reported at 354 F. 2d 990, on the appeal of the Review Committee. The court upheld that portion of the district court decision holding that the Review Committee had abused its discretion in making a *pro rata* distribution of the hardship reserve for 1964. The court then went on to hold, however, that the district court had erred in determining for itself that petitioner was entitled to a hardship allotment increasing his acreage to 141 acres, since, as the court pointed out, availability of additional land for planting was only one factor to be considered in determining the distribution of the reserve.[5] Nonetheless, the court of appeals decided to affirm the district court's decision, since "under the peculiar situation here shown, which is one not likely to recur, there is no reversible error in the district court's judgment." This was apparently based on the fact that the prior allotments were already history. To prevent misinterpretation of the affirmance, the court carefully added a caveat: "We therefore affirm its judgment but with the caveat that the increased allotment resulting from and required by its judgment is not

[5] See note 2, *supra*. Petitioner did not and does not challenge this holding.

binding as a basis for future allotments." 354 F. 2d at 991.

The County Committee thereupon retroactively reduced petitioner's allotments for 1964, 1965 and 1966 to 39.6 acres. The Review Committee on April 13, 1966, determined that the revised allotments were correct, but since imposition of the revised allotments at such a late date would cause undue hardship for petitioner, it reinstated the 141-acre allotment for 1966 only. It ruled that the revised allotments of 39.6 acres would be used as the basis for the 1967 allotment.

Petitioner thereupon returned to the district court, claiming that his 1964, 1965, and 1966 allotments were final and that under 7 U.S.C. 1344(f)(8) they must serve as the basis for his 1967 allotment. The district court, in a decision reported at 257 F. Supp. 57, agreed that the 1964, 1965 and 1966 allotments of 141 acres were final, since the Fifth Circuit had not intended by its caveat that they be reduced. But the court ruled that the "future allotments" referred to by the Fifth Circuit in its caveat included petitioner's allotments for 1967 and thereafter, and thus the Review Committee was not required to adhere to the 141-acre allotment as a basis for 1967 and future years.

On petitioner's appeal, the Fifth Circuit affirmed. *Gladney* v. *Review Committee*, 380 F. 2d 929, and it is this judgment that petitioner seeks to review. The court below pointed out that, in essence, petitioner's position was that because the Review Committee had complied with the initial district court order, pending

appeal, he became entitled to 141 acres as the base for all future allotments. This, the court of appeals held, was "clearly untenable". The Review Committee had to assume the validity of the initial order of the district court directing a 141-acre allotment for 1964, until the court of appeals passed upon it; but once the court of appeals had decided on the earlier appeal that the district court "should not have ordered an increase in the 1964 allotment, the 1965 and 1966 allotments (based upon the 1964 court ordered allotment) likewise lost all prospective significance" (Pet. App. B. 21). The court of appeals pointed out that petitioner's 141-acre allotment was not the result of a factual or policy determination by the Review Committee, but merely reflected the Committee's compliance, pending appeal, with the erroneous mandate of the district court. Thus, the original appellate decision could not be considered as modifying an independent administrative decision regarding the allotments. "It simply limited the effect of the District Court's decision on the 1964 allotment which, *pendente lite*, the Committee felt obligated to follow for 1965 and 1966" (Pet. App. B. 22). The court concluded by emphasizing that for three years petitioner received windfalls in the form of increased allotments which were ultimately found to be erroneous, and observed that he should not be permitted to capitalize upon the initial error.

The decision below is plainly correct and presents no issue calling for review by this Court. Petitioner himself recognizes that this case is unique (Pet. 4). Furthermore, he is attempting to do nothing less than

to convert his three-year windfall, produced solely by an erroneous district court ruling which was the subject of pending appeal, into a vested preferred position. Obviously, such a result would not be in keeping with the congressional objective contained in 7 U.S.C. 1344(f)(8).

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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